IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 27

FEDERAL TRADE COMMISSION, *Petitioner*

v.

FRED MEYER, INC., ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENTS' OPPOSITION TO MOTION OF ATLANTIC COAST INDEPENDENT DISTRIBUTORS ASSOCIATION, INC. FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

Respondents Fred Meyer, Inc., Fred G. Meyer and Earle A. Chiles oppose the motion of the Atlantic Coast Independent Distributors Association, Inc. (ACIDA) for leave to file a brief *amicus curiae* on the

grounds that the interest of ACIDA lies not in the resolution of the issue before this Court but in the voicing of an essentially private controversy which has no bearing on that issue. The role of an *amicus curiae,* as we understand it, is a limited one. He is required to deal with the issue that is pending before the Court. Instead of doing this, ACIDA seeks to present facts and arguments arising in an entirely different controversy and involving separate and different issues.

Also, to the extent there may be any application of the holding of the court of appeals to the business of the ACIDA members (which we are unable to observe), there is no reason to believe the Solicitor General's Office will fail or be unable adequately to present the facts or questions of law to this Court. ACIDA does not contend otherwise.

The *sole* issue before this Court is whether Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(d), requires a supplier to make promotional payments available on proportionally equal terms to customers operating at different functional levels, i.e., to wholesale and retail customers. This narrow issue involves *only* Section 2(d); no other subsection of the Robinson-Patman Act is in any way involved. It is evident, however, that ACIDA's controversy with the periodical and paperback suppliers does not concern Section 2(d) at all but is founded in Section 2(a) of the Act.

Section 2(d) prohibits a seller from making payments to a customer "as compensation or in consideration for any services or facilities furnished by or

through such customer in connection with the processing, handling, sale or offering for sale" of the seller's goods "unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution" of such goods. It is settled that the prohibition of this section is against the payment of money, or other consideration, as compensation for *promotional* or *advertising* services rendered by the customer in connection with the customer's *resale* activities. See Rowe, *Price Discrimination Under the Robinson-Patman Act* (1962), at 107, 370-372, 376-381, and cases there cited. A payment made by a supplier, or the furnishing of such services by a supplier as are the subject of ACIDA's complaint, in connection with the *original sale* of the supplier's goods, rather than in connection with the *resale* of those goods by the customer, is, on the other hand, cognizable only under Section 2(a) of the Act as a discrimination in price (*Id.* at 103-105, 107, 376-381).[1]

It is thus evident that what ACIDA really asks this Court to consider is whether the specific practice complained of results in an unlawful *price* discrimination against its wholesaler-members. This controversy is not before the Court in the instant case.

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[1] The alleged discriminatory services furnished by the periodical and paperback suppliers consist of extension of credit terms, maintaining and placing current materials in customer outlets, and processing returns of unsold merchandise. These services are clearly not furnished "as compensation or in consideration" for the furnishing by customers of other services in connection with the customers' resale function; no *quid pro quo* whatsoever passes from the customer to the supplier as is required under Section 2(d).

CONCLUSION

The motion of Atlantic Coast Independent Distributors Association, Inc. for leave to file a brief *amicus curiae* should be denied.

Respectfully submitted,

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